F. M. S. REPORTS.

[ORIGINAL CIVIL JURISDICTION]

CUSSEN, J.

March 1, 1941.

MOHIDEEN BATCHA vs. FATIMAH BEE alias BATCHA AMMAL.

[SELANGOR PROBATE FILE No. 106 of 1940]

Probate and Administration Enactment (Cap. 8), section 47—Appointment of administrator pendente lite—"Suit" in that section means a Probate Suit as defined in Rule 1 of the Rules for Contentious Business (Probate and Administration).

The applicant applied for letters of administration in the estate of one Beejanbee deceased. The respondent entered a caveat which was warned and the respondent thereupon entered an appearance. The matter was not then, however, entered as a cause in the Court book as required by Rule 65 of the Rules for Non-Contentious Business.

Held, that in these circumstances, the matter had not reached the contentious stage; that there was therefore no pending suit within the meaning of section 47 of the Probate and Administration Enactment; and that the Court therefore had no jurisdiction to grant the application for the appointment of an administrator pendente lite.

Cases referred to:—

(1) *Salter v. Salter* (1896) P. 291; 75 LT. 7.
(2) *Moran v. Place* (1896) P. 214; 74 L.T. 661.
(3) *Trimble v. Hill* 5 A.C. 342.
(4) *Horrell v. Witts* (1866) L.R. 1 P. & D. 103; 14 W.R. 515.
(5) *Jogendra v. Atindra* 2 J.C. 638.
(6) *Liew Siew Yin (f.) v. Lee Pak Yin* (1939) 8 M.L.J. 319.

E. D. Shearn (M. N. Cumarasami with him) for applicant: On the facts as shown in the Affidavits it is necessary for an administrator pendente lite to be appointed. The application is made under section 47 of the Probate and Administration Enactment. As to this see 17th Edition Tristram & Coote, p. 243, and section 500 of the Civil Procedure Code.

Roland Braddell (R. Ramani with him) for caveator: The estate of Mohamed Kassim deceased is not being dealt with here.

This is important because allegations made against Gaffoor relate to estate of Mohamed Kassim deceased.

It is only the estate of Beejanbee deceased that is dealt with.

Apart from the Deed of Gift her estate consists of:—

(a) interest in the estate of Mohamed Kassim deceased;

(b) her share in the business.

(a) is in the hands of a receiver and therefore adequately protected and as to (b) Gaffoor has always been in charge as attorney of the proprietors.

It is incorrect to say that the petitioner is the son.

The petitioner here is Mohideen Batcha.

It is submitted that there is no estate because of the Deed of Gift.

As to the Deed itself there is a presumption of honesty.

Until it is set aside there is no estate and no interest for the son.

With regard to the suit to set aside the Deed of Gift it has always been conceded that the son if he wishes can bring an action now.

See the Order of the Court of Appeal.

The answer to this application is two-fold:

(a) there is no jurisdiction to make a grant pendente lite at this stage;

(b) even if you had jurisdiction a Court will not make it on the facts alleged.

As to (a) see:

Tristram & Coote, pp. 651, 414 and 421;

14 Hailsham, p. 270;

Mortimer, p. 382;

Williams, p. 354, and the cases of

Salter v. Salter(1);

Moran v. Place(2).

The Federated Malay States rules of Probate business are identical with the rules in England.

English decisions are therefore applicable.

See **Trimble v. Hill**(3).

As to (b) to get an administrator pendente lite you must show necessity.

It is not the law that an administrator pendente lite is appointed wherever a receiver would be.

The passage in 14 Hailsham 270 is not borne out by the cases cited.

See **Tristram & Coote**, p. 243;

Mortimer, p. 377—8;

Williams, p. 353;

Horrell v. Witts(4).

See also the corresponding section in the Indian Succession Act (Sec. 218).

Henderson, p. 410.

Jogendra v. Atindra(5).

No necessity at all has been shown in this case.

With regard to the allegations against Gaffoor the Court will disregard new allegations in Affidavit in reply.

See Rule 17 of the Court Rules and **Liew Siew Yin (f.) v. Lee Pak Yin**(6).

With regard to the argument that this appointment is wanted because they desire to bring an action by way of dissolution of partnership it is submitted that such an action cannot be brought at all by an administrator pendente lite.

[Counsel then dealt with the allegations of facts.]

Shearn in reply: The English authorities are not in point on the question of whether a suit is pending or not. In England a probate in common form is granted without any proceeding being instituted inter partes.

No writ is issued where probate in common form is granted. In the Federated Malay States applications for probate in common form are commenced by petition in Court. See section 70 of the Probate and Administration Enactment. This should be compared with the English practice. 17th Edition **Tristram & Coote**, p. 830. A suit is not defined in the Probate and Administration Enactment but under the Limitations Enactment it means an action or other proceeding. An administrator **pendente lite** can be appointed when there is already an administrator appointed. Section 47 contemplates an administrator **pendente lite** in a suit revoking a grant of probate or letters of administration.

[*Counsel then replied on the facts.*]

Cussen, J.—This is an application to the Court made under section 47 of the Probate and Administration Enactment (Cap. 8) for the appointment of an administrator "*pendente lite*" to the estate of one Beejanbee deceased. It is made by a son of the deceased and opposed by a daughter of the deceased.

Two questions arise for determination from the hearing of this application:

(*a*) a question of law; and

(*b*) a question of fact.

The question of law was raised by Counsel for the respondent, and I will deal with it first.

Briefly, the submission was that the Court had no jurisdiction to make an appointment under section 47 becaust there was no "*lis pendens.*"

Section 47 reads as follows:

"Pending any suit touching the validity of the will of a deceased person or for obtaining or revoking any probate or any grant of letters of administration, the Court may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator other than the right of distributing such estate; and every such administrator shall be subject to the immediate control of the Court and shall act under its direction."

Mr. Braddell's argument was that on this matter there was in fact no pending suit—no "*lis pendens.*"

It was not disputed by Mr. Shearn that, if that was so, the Court had no power to make the appointment; which is of course a self-evident proposition from the words of section 47.

Mr. Braddell submitted that the word "suit" in the section can only mean a "Suit" in the sense in which it is used in the Civil Procedure Code, i.e., a proceeding instituted by the presentation to the Court of a Plaint as required by section 41 to 43 of the Code.

Mr. Shearn contended in reply that the word "Suit" in section 47 of the Probate and Administration Enactment had a wider meaning and includes proceedings other than those instituted by a Plaint; and referred to the definition in section 2 of the Limitation Enactment (Cap. 18), i.e., "'Suit' includes any action or other proceeding."

Neither Counsel, as far as I recollect or have noted, referred to the definition of "Probate Suit" in Rule 1 of the "Rules for Contentious Business (Probate and Administration)," which is:

"1. The words 'Probate Suit' in these rules are to include suits and other matters relating to the grant or recall of probate or of letters of administration other than non-contentious business."

Rules 19 and 20 provide for the commencement of "all Probate Suits" as follows:

"19. All probate suits are to be commenced by a summons issued at the instance of the plaintiff against the defendant which shall be endorsed with a statement of the nature of the plaintiff's claim against the defendant and also the defendant's interest by showing the grounds for bringing the defendants into the suit, whether as next-of-kin, or as a party entitled in distribution or as interested under another will.

20. The issue of a summons in probate suits shall be preceded by the filing of an affidavit made by the plaintiff or one of the plaintiffs in verification of the indorsement on the summons."

So that no Probate Suit is ever commenced by the presentation of a Plaint in the manner of a suit under the Civil Procedure Code.

In my opinion, this—"Probate Suit"—is the meaning of the word "suit" in section 47 of the Probate and Administration Enactment, and so it includes all matters relating to the grant or recall of probate or letters of administration other than non-contentious business.

It is relevant to consider the title to the aforesaid rule, i.e., "Rules for regulating the practice and procedure in the Supreme Court in respect of contentious business in probate and administration causes" and in contrast the title to the "Rules for Non-contentious Business (Probate and Administration)", i.e., "Rules and instructions for the Registrar, Assistant Registrars and Deputy Registrars . . . . in respect of non-contentious business in the Supreme Court in its probate jurisdiction," and also the definition therein of "Non-contentious Business":

"Non-contentious business means the business of obtaining probate and administration where there is no contention as to the right thereto. . . . and all business of a non-contentious nature to be taken in the Court in matters of testacy and intestacy, not being proceedings in any suit."

In fine, I conclude the word "suit" in section 47 of the Enactment is limited to contentious business relating to the grant or recall of probate or letters of administration.

The question then follows: Is there in the present case any "pending suit" in the sense of a "Probate Suit"? It is, I think, quite clear that until contentious business commences there cannot ever be a "Probate Suit."

I must now set out briefly what has happened in the proceedings to which this present application is a sequel.

The present applicant applied for letters of administration to the estate of the deceased. The respondent entered a Caveat which was warned and the respondent entered an appearance. All this was of course done under the "Rules for Non-contentious Business." That brought the matter up to the stage provided for in Rule 65 of the "Rules for Non-Contentious Business" but it stopped there. Rule 65 was never complied with. Rule 65 reads:

"Upon an appearance being entered in answer to the warning of a caveat the matter shall be entered as a cause in the Court book and the contentious business shall thereupon be held to commence...."

In this case the matter was not entered as a cause in the Court book and so did not reach the stage of contentious business.

The petition for letters of administration came before the learned Judge (Gordon-Smith, J.A.), and he made a grant of letters of administration to the petitioner, for the reason, as I understand his judgment, that, as Rule 65 had not been complied with, the matter was still non-contentious.

If this matter had, as required by Rule 65, been entered as a cause in the Court book thereby commencing contentious business, there would arise therefrom by action under Rules 19 and 20 a "pending suit" in the meaning of section 47. But that is not so. I hold there is no pending suit and therefore this Court has no jurisdiction to make an appointment of administrator *"pendente lite"* under section 47 of the Probate and Administration Enactment.

That is sufficient to dispose of this application, but I will state briefly my conclusion on the question of fact I referred to—on the assumption that the Court has jurisdiction.

For the Court to make an appointment of an administrator *"pendente lite"* it must be shown that there is some proper object, some necessity, for making the appointment (Rule 42).

Without setting out the peculiar circumstances and facts of this case, I will simply say that I am far from satisfied that there is a real necessity for the appointment asked for.

An appeal has been brought by the respondent against the decision of Gordon-Smith, J.A., which has not yet been heard. But pending the hearing the respondent has obtained an Order of the Court of Appeal "staying all proceedings upon and by virtue of the Order of the Honourable Mr. Justice Gordon Smith" until the decision of the Court of Appeal.

This application is therefore dismissed.

Applicant to pay the taxed costs of respondent—the applicant to recover such costs and his own costs from the estate of the deceased in the event of it being established that there is such an estate. All costs referred to to be party and party costs.

Application dismissed.

[Note.—Other proceedings in this matter are dealt with in the decision of the Court of Appeal to be reported later. In those proceedings the Court of Appeal held that contentious proceedings had commenced as soon as appearance had been entered to the warning. The judgment of the Court of Appeal in the further proceedings must therefore also be considered on this point. Ed. M.L.J.]

[APPELLATE CRIMINAL JURISDICTION]

TERRELL, Ag. C.J.

May 6, 1941.

PUBLIC PROSECUTOR vs. CHEONG KAM.

[App. Crim. Juris. (Terrell, Ag. C.J.) May 6, 1941]

Road Traffic Enactment 1937, sections 25 (1), 26 (1)—Dangerous driving—Inconsiderate driving—What constitutes dangerous driving—Rights of passage along public road.

A pedal cyclist has just as much right to use the road as a motor-cyclist. To overtake a cyclist who is far from steady at the moment that a heavy lorry is coming in the opposite direction is to take an unjustifiable risk and therefore constitutes dangerous driving. The facts appear sufficiently from the judgment.

T. V. A. Brodie, Deputy Public Prosecutor, for Public Prosecutor.

Respondent in person.

Terrell, Ag. C.J.—The respondent, riding a motor-cycle and side-car, was overtaking a cyclist when a Public Works Department lorry coming in the opposite direction caused him to swerve slightly to the left. In the result the side-car struck the cyclist who